

1
2 STATE OF WISCONSIN CIRCUIT COURT BR. 11

3
4 CITY NEWS & NOVELTY, INC.,

5 Plaintiff,

6 -vs-

FILED

IN CIRCUIT COURT

CASE NO. 96-CV-1427

7 APR 2 1997

DECISION

8 CITY OF WAUKESHA,

WAUKESHA CO., WISCONSIN

Defendant. CYNTHIA S. ERNST, CLERK

9
10
11 Plaintiff, City News & Novelty, seeks
12 certiorari review of defendants', City of Waukesha and
13 City of Waukesha Administrative Review Board, decisions
14 not to renew their license to operate an adult oriented
15 establishment at 245 West Main Street in the city of
16 Waukesha. Plaintiff contends that the action of the
17 defendant in failing to renew plaintiff's license was
18 unlawful because the licensing ordinance is
19 unconstitutional and represents unconstitutional
20 restraint; plaintiff contends that it was denied due
21 process with respect to notice and an impartial
22 tribunal; further the plaintiff contends that the record
23 is inadequate as a matter of law to support the findings
24 of the Administrative Review Board.

25 Review on certiorari is limited to

1 whether, (1) the board kept within its jurisdiction; (2)
2 it acted according to law; (3) its action was arbitrary,
3 oppressive, unreasonable and represented its will and
4 not its judgment; and (4) the evidence was such that it
5 might reasonably make the order or determination in
6 question. Coleman v. Percy, 96 Wis. 2d 58, 588 (1990).
7 On review courts should be "hesitant to interfere with
8 the administrative determinations and accord the
9 decision of the board [of appeals] a presumption of
10 correctness and validity." Snyder v. Waukesha Zoning
11 Board, 74 Wis. 2d 468, 476 (1976). Further on
12 certiorari this court may not disturb the Board's
13 findings if they are sustained by any reasonable view of
14 the evidence nor substitute its discretion for that of
15 the Board.

16 Plaintiff contends that the Waukesha
17 Licensing Ordinance Section 8.195 under which the City
18 Administrative Review Board acted is facially
19 unconstitutional. Ordinarily, certiorari is confined to
20 a review of the decisions of an administrative agency.
21 Common councils and boards of review are not empowered
22 to declare legislation unconstitutional. Such bodies
23 can determine whether constitutional elements of due
24 process have been accorded applicants. Kniec v. Town of
25 Spider Lake 60 Wis. 2d 640, 645 (1973). Some cases hold

1 that declaratory judgment is the vehicle for a test of
2 constitutionality. The court after research concludes
3 that the case of Omernick v. Department of Natural
4 Resources, 100 Wis. 2d 234 (1981) sets the procedural
5 policy for Wisconsin:

6 We believe Cobb reflects a fundamental policy
7 that parties to an administrative proceeding
8 must raise known issues and objections and
9 that all efforts should be directed toward
10 developing a record that is as complete as
11 possible in order to facilitate subsequent
12 judicial review of the record under Section
13 227.20 Stats. That policy, applicable in this
14 case as it was in Cobb, requires that those
15 constitutional issues be raised even though
16 the administrative agency is without power to
17 decide them. p. 248.

18 Plaintiff did not specifically address
19 the constitutional issues in the hearings before the
20 Administrative Review Board; however in January of 1996,
21 in a "request for a review" of the determination of the
22 Common Council, the specific constitutional infirmities
23 of 8.195 alleged by the plaintiff were listed. In a
24 footnote, the plaintiff noted that it was reserving the
25 "right to raise issues pertaining to the
 constitutionality of Section 8.195 in state or federal
 court in an appropriate action at an appropriate time."
 The brief supporting the request concludes with a
 paragraph that contains the following language: "In
 particular, the omission of any constitutional arguments

1 is not intended as a waiver of said arguments because
2 the applicant understands that the Council does not have
3 jurisdiction to declare any portion of the City's
4 ordinances unconstitutional. The applicant intends to
5 raise the constitutional issues in an appropriate
6 forum." From this record, the court concludes that the
7 plaintiff has raised specifically the constitutional
8 issues and under the Omernick case the court has
9 jurisdiction to decide them. Contrary to defendant
10 counsel's belief, plaintiff is not attacking Wisconsin
11 Statute Chapter 68.

12 The first issue concerns the plaintiff's
13 assertion that no explicit standards for renewal of
14 licenses are contained in the defendant's ordinance.
15 The plaintiff contends that the Board was acting against
16 the law in utilizing the standards for granting of a new
17 license under Section 8.195 (4). Plaintiff argues the
18 holdings in these cases support their position: Renton
19 v. Play Time, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed. 19,
20 (1986); City of Lakewood v. Plain Dealer Publishing
21 Company, 486 U.S. 750, 108 S.Ct. 2138, 100 L.Ed. 771,
22 (1988); and Wolff v. City of Monticello, 803 F.Supp. 1568
23 (Minnesota, 1992).

24 Defendant argues that plaintiff's counsel
25 conceded the propriety of utilizing the standards under

1 8.195 (4) because plaintiff's counsel submitted findings
2 of fact and conclusions of law to the administrative
3 review board adopting same as the standards for
4 renewal. The court does not find this argument of the
5 defendant to be persuasive.

6 Defendant next observes that the language
7 of 8.195 was analyzed in Suburban Video v. City of
8 Delafield, 64 F.Supp. 585, (E.D. Wis., 1988). The
9 Delafield ordinance has the same language with respect
10 to "renewal" and other strictures as the Waukesha
11 ordinance. This court finds that the constitutionality
12 is not only presumed but confirmed by precedent.

13 Defendant further argues that a reading of the entire
14 ordinance reveals that the granting of new licenses,
15 suspensions, revocations and renewals is dictated by the
16 same standards: i.e., the presence or absence of
17 violations of the sections of the ordinance. In a reply
18 brief, plaintiff notes the denotations of "issue" and
19 "renew" are quite separate. The court finds that in
20 Section 8.195(4) the word "issuance" (a nominalization)
21 only appears in the heading. The headings (STANDARDS
22 FOR ISSUANCE OF LICENSE, FEES, RENEWAL OF LICENSE OR
23 PERMIT, REVOCATION OF LICENSE) and the numerical
24 enumeration are matters of style and indexing. The
25 headings and enumerations are not operative parts of the

1 legislation. When Section 8.195(4) is read in
2 conjunction with 8.195(10)(b) the language demonstrates
3 that the standards for obtaining a license apply.

4 The City of Lakewood case is
5 distinguishable because the ordinance in question
6 contained no standards. Wolff is also inapplicable
7 because the format and language of the ordinance in that
8 case was quite different from the Waukesha city
9 ordinance. Therefore the court concludes that the
10 ordinance is explicit with respect to the standards to
11 be applied when an applicant seeks renewal and the
12 Administrative Review Board did not act unlawfully.

13 Plaintiff next asserts that the language
14 of the ordinance permits unbridled discretion because
15 Section 8.195(4)(d)(2) is vague. The plaintiff argues
16 that the words "shall have been found" is not defined
17 and is open to subjective decision making. The
18 plaintiff contends that the language can't survive a
19 vagueness challenge. The concern here is heightened
20 because of the ordinance requirement to renew annually.
21 City of Lakewood, supra, 760. The court finds that
22 Judge Evans reviewed the same language with approval in
23 Suburban Video v. The City of Delafield; also the
24 plaintiff has cited no case stating that use of the word
25 "found" is improper. The court notes that the forms of

1 the verb "to find" are part and parcel of legal
2 procedure. "To find" is to make a determination of
3 fact; it's the act of an adjudicator after investigation
4 or hearing. The cases cited by plaintiff all concern
5 criminal statutes and involve whether the prohibited
6 conduct is stated clear enough. State v. Courtney, 74
7 Wis. 2d 705, (1976); State v. Tronca, 84 Wis. 2d 88,
8 (1977); State v. Pompanz, 112 Wis. 2d 166, (1983).

9 Plaintiff does not attack the nature of
10 the conduct which "if found" constitute a violation of
11 the ordinance. This court finds that the past perfect
12 subjunctive "shall have been found to have violated"
13 sets limits on the municipal body rather than granting
14 unbridled discretion. The Common Council can only act
15 when facts or evidence of a violation exist. The action
16 is then subject to review under the substantial evidence
17 test. The language is not vague.

18 The next two constitutional challenges
19 can be combined: the challenges in regard to time
20 limits; and for failure to preserve the status quo
21 throughout the review process. The court agrees with
22 the plaintiff that the review in this area must be
23 confined to the statutory language and not the
24 chronology of plaintiff's own renewal process. Because
25 an applicant may choose to waive a time limit or because

1 the Council did not upset the status quo are not
2 relevant.

3 The importance of time limits is clear:

4 The core policy underlying Freedman is that
5 the license for a first amendment protected
6 business must be issued within a reasonable
7 period of time, because undo delay results in
the unconstitutionality suppression of
protected speech. FW/PBS, Inc., v. Dallas,
493 U.S. 215, 224, 110 S.Ct., 603.

8 The court does not find that
9 8.195(7)(c)--filing by police department, and (7)(d)--
10 inspection by the building inspector create the
11 capability to delay the decision on the grant or denial
12 of a license. The sections do not change the 21-day
13 time period after receiving an application for a
14 license. In FW/PBS v. Dallas, the license was
15 conditioned on an inspection by "health and fire
16 departments and building officials" for compliance with
17 other ordinances. No time limit was set for the
18 inspections. In the case at hand, the grant or denial
19 is not conditioned on inspection and compliance.

20 Plaintiff next argues that, consistent
21 with Redner v. Dean, 29 F. 3d, 1495, (11th Cir., 1994),
22 the ordinance is defective because there is no time
23 limit on the Common Council to decide after the public
24 hearing specified in 8.195(3)(d).

25 (d) Whenever an application is denied, the
city clerk shall advise the applicant in

1 writing of the reasons for such action. If
2 the applicant requests a hearing within ten
3 days of receipt of notice of denial, a public
4 hearing shall be held within ten days
thereafter before the council or its
designated committee as here in after
provided.

5 This subsection must be read, with
6 respect to procedures and time limits, in conjunction
7 with Section 2.11 which adopts Chapter 68 of the
8 Wisconsin Statutes.

9 8.195(11) ADMINISTRATIVE REVIEW PROCEDURE. The
10 City ordinances and State Law shall govern the
11 administrative procedure and review regarding
the granting, denial, renewal, nonrenewal,
revocation or suspension of a license.

12 The ordinance and the statute establish a
13 licensing scheme which does not allow "unbridled
14 discretion in the hands of government official or
15 agency."

16 Reference to the provisions of Chapter 68
17 negates the arguments of the plaintiff. The city clerk
18 notifies the applicant in writing whether the
19 application is granted or denied, 8.195 (3). This is a
20 determination according to 68.01. At this point, the
21 applicant can ask for a public hearing which must be
22 held within ten days. 8.195 (3); and/or the applicant
23 may proceed under 68.08, a request for review. The
24 review has time limit of 15 days pursuant to 68.09. The
25 applicant has other options under 68.10 which has time

1 limits for review and decision. (68.11 and 68.12).

2 In the case at hand plaintiff chose to
3 file a request under 68.08 immediately after the Common
4 Council made the initial determination to deny the
5 license renewal. The applicant does not bear any
6 burden; the applicant merely chooses which facet of
7 review to pursue and the City must follow the prescribed
8 time limits. The court finds this licensing scheme
9 comports with the holding in FW/PBS, Inc., v. Dallas;
10 there is no part of the licensing scheme that allows
11 indefinite postponement of the issuance or renewal of
12 the license.

13 Plaintiff raises the question of
14 preserving the status quo. None of the cases cited deal
15 with status quo for renewals. The city did not address
16 this issue in their brief. Again the fact that the
17 Council did not halt the plaintiff's operation during
18 the renewal and review process is not dispositive of the
19 challenge.

20 Time limits and status quo go hand in
21 hand. The most instructive case is T.K.'s Video, Inc.,
22 v. Denton County Texas, 24 F. 3d 705 (5th Circuit
23 1994):

24 Nor is this unduly restrictive, given the
25 availability of expeditious judicial review. A rejected license applicant has 30 days to seek judicial relief before the order of the

1 director of public works becomes final.

2 This does not answer the further question of
3 how much of the total licensing process must
4 be complete within the specified brief period,
5 specifically whether the brief period includes
6 completion of judicial review. Despite
7 contrary suggestions in Justice Brennan's
8 opinion in FW/PBS, Inc., and some uncertainty
9 in the language of Justice O'Connor's opinion
10 in the same case we read the supreme court to
11 insist that the state must offer a fair
12 opportunity to complete the administrative
13 process an access to the courts within a brief
14 period. A brief period within which all
15 judicial's avenues are exhausted would be an
16 oxymoron.

17 T.K. objects that the order does not provide
18 automatic and prompt judicial review or an
19 automatic stay of an order denying a license.
20 As we explained the order provides that filing
21 a notice of appeal to the state district court
22 of Denton County stays an administrative
23 decision revoking or suspending a license so
24 the focus of T.K.s intentions is on the
25 absence of stay of an order denying a
license. FB/PBS requires only a prompt
judicial hearing, a standard that the order
meets by giving an unsuccessful license
applicant 30 days to appeal to a district
court in Denton County "on a trial de novo
basis." The availability of expeditious
judicial review obviates the need for
automatic stay. Citation omitted page 709.

19 The court concludes that the license
20 renewal scheme of 8.195 obviates the need for an
21 automatic stay. The application must be filed at least
22 60 days before the license terminates; the applicant
23 must be notified within 20 days of the grant or denial;
24 review by ordinance or Chapter 68 can be completed
25 within 10 to 15 days. A hearing on the appeal under

1 68.10 must be heard within 15 days and a determination
2 made within 20 days of the completion of the hearing
3 under 68.12. The scheme provides that most of the
4 review process can be completed prior to the expiration
5 of the one year term of the license.

6 On the question of whether the ordinance
7 on its face provides for prompt judicial review, the
8 court has read the cases and arguments presented by both
9 counsel. The court concludes that the ordinance in
10 Section 8.195(11) provides access to prompt judicial
11 review under Wisconsin Statute Chapter 68. Section
12 68.001 provides as follows:

13 68.001. Legislative purpose. The purpose of
14 this chapter is to afford a constitutionally
15 sufficient, fair and orderly administrative
16 procedure and review in connection with
17 determinations by municipal authorities which
 involve constitutionally protected rights of
 specific persons which are entitled to due
 process protection under the 14th amendment to
 the U.S. Constitution.

18 In particular, the judicial review by
19 certiorari can be accessed under 68.10(1)(b) as well as
20 after the decision by the Administrative Review Board.
21 Under the circumstances, this court finds the ruling in
22 Graff v. City of Chicago, 9 F.3d 1309, (7th Cir., 1993)
23 supports the court's conclusion.

24 Plaintiff at the time of the Board
25 hearing raised the due process issue concerning an

1 impartial tribunal. Plaintiff specifically challenged
2 Mayor Opel and Alderman Seidl because the two had
3 "participated" in the Common Council meetings which
4 passed a resolution denying plaintiff's renewal of the
5 license. Counsel for the plaintiff argued that the
6 Mayor and alderman were there:

7 "The fact is he was there. The fact is he
8 heard the debate. The fact is that he had
9 this collegial association with the rest of
10 the Common Council as did your Honor, the
11 Mayor." (Transcript of April 12, 1996, page
12 14).

11 The members of the board responded to the
12 challenge. The court finds that none of the cases cited
13 by the plaintiff in this regard bear upon the situation
14 presented. Upon review of the DeLuca v. Common Council
15 decision at 72 Wis. 2d, 672 (1976), this court finds
16 that plaintiff was not denied an impartial decision
17 maker for the following reasons:

18 (1) Mayor Opel and Alderman Seidl were not
19 reviewing their own decisions because they had not
20 presented, argued, or voted on the Resolution in
21 question.

22 (2) The Mayor was obliged by statute to conduct
23 Common Council meetings as part of her duties and the
24 city's rules of order; likewise, the alderman was
25 obligated to attend the Council meetings.

1 (3) The Mayor and the alderman sit on the
2 administrative review board pursuant to the city's
3 ordinances; they are not volunteers.

4 (4) The Mayor as part of municipal procedure always
5 signs, along with the clerk, any resolution of the
6 Common Council. This activity is administrative in
7 nature to provide authenticity to the document, not to
8 pass on the merits of the legislation. This procedure
9 is followed for resolutions and ordinances in most
10 municipalities.

11 (5) Nothing in the record shows that the two
12 individuals should be disqualified or precluded from the
13 administrative review board by prior conduct. There is
14 no prohibition or disqualification in that the
15 adjudicators heard the details of the Resolution
16 (allegations) or the debate involving said Resolution.

17 (6) While the DeLuca case rejected a finding using
18 hindsight, for completeness sake this court notes that
19 Mayor Opel conducted the protracted and often
20 contentious hearing in a fair and proper manner. She
21 often deferred to and looked for guidance from the legal
22 counsel for the board. Nothing in the questions or
23 statements by either the Mayor or Alderman Seidl
24 demonstrate partiality or a closed mind to the
25 plaintiff's positions.

1 The plaintiff contends that the review
2 board found that the plaintiff had committed a violation
3 of the open booth provision on a totally different date
4 than alleged in the Resolution. The Resolution of
5 December 19, 1995, indicates that:

6 WHEREAS on "November 30, 1994, December 1,
7 1994, and December 2, 1994, City News &
8 Novelty, Inc., through its employees and/or
9 agents violated the provisions of section
10 8.195(9)(b)(3) of the Waukesha Municipal Code
 by failing to have every booth, room, or
 cubicle totally open to a public lighted aisle
 so that permitting an unobstructed view of all
 times of anyone occupying same.

11 WHEREAS each of the violations set forth
12 above resulted in five convictions in
13 municipal courts in the city of Waukesha
 during 1995 license year.

14 At the hearing, Marv Lemke, house
15 inspector for the city, testified that his recollection
16 was that on November 7, 1994, the booths had been
17 improperly narrowed; that on either November 9 or 10 he
18 dropped off some literature with a Mr. Bishop at the
19 establishment and observed that the booths were not in
20 compliance. His testimony at the hearing further
21 indicated he recalls dropping off some literature on
22 November 28 and again observing the booths not in
23 compliance. He further testified at the hearing that on
24 November 30 his inspection of the establishment
25 indicated the booths had been cut back as well as an

1 observation on December 9 that the booths had been cut
2 back. (April 2, 1996, transcript pages 280-282).

3 Plaintiff further introduced Exhibits 24 and 25 which
4 represent memos made Lemke on March 29, 1996, and
5 12-9-1994 respectively. The Board in its findings and
6 conclusions found that the open booth violation had
7 occurred on November 7, 1994, the date of Inspector
8 Lemke's first visit (Section 16 B.1 page 8 and 9).

9 Because City News and Novelty was given no notice that a
10 violation was alleged to have occurred on November 7,
11 1995, and because the plaintiff never received the
12 citation for a problem on November 7, notice of this
13 violation was not given and constitutes unlawful action
14 by the Board and an improper basis for denying renewal
15 of license.

16 The court concludes that the plaintiff
17 had been notified with sufficient and reasonable
18 particularity regarding the times and dates of offenses
19 sufficient to meet the accusations and prepare to defend
20 against it for the following reasons:

21 (1) Plaintiff admits in their brief on page 27 that
22 they had received citations for activities on
23 November 30, 1994, and subsequent dates involving the
24 booths and had been convicted in municipal court in 1995
25 based on testimony from Inspector Lemke.

1 (2) The Resolution refers to the citations and the
2 particular section involving the booths that the city
3 was concerned about. The record indicates that
4 Inspector Lemke had conversations about the booths with
5 employees of City News & Novelty in November and
6 December of 1994.

7 (3) These contacts referred to wooden panels
8 observed affixed to the booths at the rear of
9 plaintiff's store during November of 1994.

10 (4) The plaintiff has made no showing that he has
11 been unable to respond or prevented from mounting a
12 defense to the existence or nonexistence of wooden
13 infringements on the sides of the booths.

14 Plaintiff cites evidence that was
15 introduced at the administrative review hearing which
16 were beyond the allegations set out in December 19,
17 1995, Resolution. These consist of the board hearing
18 the testimony of Timothy Morgan regarding an incident on
19 March 7, 1976, not referred to in the Resolution.
20 Plaintiff also criticizes the receipt of the following
21 exhibits: No. 33, a witness statement taken by Officer
22 Conkle of Sonny Dietscher; No. 43, the record of
23 conviction for Timothy Morgan for retail theft; Exhibit
24 35, a subpoena for a David Hull; Exhibit 36, a copy of
25 the complaint of a 1990 lawsuit involving the plaintiff;

1 Exhibit 37, the citation issued to a Jaimie Barr in
2 April of 1994 for sale or displays of sexual materials
3 to a minor. The court finds that the testimony of
4 Timothy Morgan was objected to by plaintiff's counsel in
5 a timely fashion as were the other exhibits listed
6 above. With respect to Mr. Morgan and all of the
7 exhibits listed, the decision of the board did not
8 include any findings with respect to the credibility of
9 Mr. Hull or Mr. Morgan and did not make any findings
10 with respect to the exhibits objected to by the
11 plaintiff. The rulings of the Administrative Review
12 Board indicate that they relied on the testimony of
13 police officers and their observations concerning
14 activities of minors and others at the plaintiff's
15 store. The Board found that the testimony of the
16 officers was unrefuted. Nowhere in the record does the
17 court glean that the introduction of these exhibits and
18 the testimony of Mr. Morgan were considered as a basis
19 for denial and therefore the opportunity and elements of
20 due process with respect to notice have not been
21 violated. Indeed the Board kept within the allegations
22 of which City News & Novelty had prior notice.

23 The plaintiff argues that the license
24 should have been suspended rather than denied. The
25 matter of whether to suspend rather than deny renewal is

1 a matter within the discretion of the licensing
2 authority. The court cannot substitute or exercise its
3 own discretion on certiorari review. The number, nature
4 and timing of the violations found by the Board gave a
5 reasonable basis for the denial of the plaintiff's
6 renewal application. Because there have been no recent
7 violations, the Board could have ruled otherwise; they
8 chose not to do so.

9 The last complaint of the plaintiff is
10 that the evidence on which the nonrenewal was affirmed
11 was inadequate as a matter of law. The court disagrees
12 with plaintiff's analysis that the actions of patrons
13 cannot be grounds for disqualification. Sections
14 8.195(9)(c), (10)(b) and (10)(f) apply to hold the
15 operator responsible for activity observed by Officers
16 Gibbs and De Jarlais at City News & Novelty. Plaintiff
17 attacks the Board's "findings" with respect to minors
18 being present in the store. Because the plaintiff has
19 not been convicted, even in municipal court, the
20 evidence cannot serve as a basis for the denial of a
21 license. The record is supported by substantial
22 evidence that the minors were allowed to loiter around
23 or frequent the store. The evidence for the finding of
24 responsibility of the operator under 8.195(10)(c) and
25 (b) comes from the line of testimony of four police

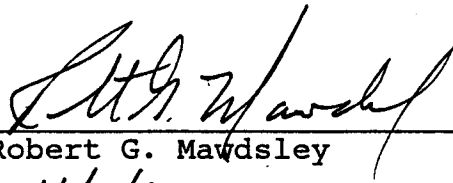
1 officers. The Board's factual findings are supported by
2 substantial and credible evidence in the record. This
3 court concludes that the facts of record constitute
4 violations of the ordinance as specified by the Board.

5 Plaintiff argues in his brief that the
6 citations issued to Peggy Lindsley, employee, and Daniel
7 Bishop, a director of City News & Novelty, are on
8 appeal. Plaintiff later notes in a letter that the
9 convictions have been vacated. The court on certiorari
10 cannot add to the record or take new evidence except in
11 unusual circumstances. This court concludes that the
12 issuance of the citations revolve around police officers
13 observing a patron who was a minor on December 24,
14 1994. There is no subjective discretion exercised by
15 Officer Piagentini when he testifies to the fact a
16 patron at the store was a minor; there is no subjective
17 discretion exercised by the Board in finding the
18 testimony credible.

19 The court concludes that the ordinance in
20 question survives the constitutional challenges brought
21 by the plaintiff; that plaintiff, was accorded due
22 process with respect to the hearings before the
23 Administrative Review Board; and finds that the evidence
24 upon which the Review Board's findings are based
25 represents relative and probative evidence. Such

1 evidence that a fact-finder could base conclusions that
2 violations of the ordinance had occurred and that the
3 Council was empowered to deny renewal of plaintiff's
4 license. Accordingly the court affirms the decision of
5 the Administrative Review Board for the City of
6 Waukesha.

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11 By the Court:
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16 _____
17 Robert G. Mawdsley
18 4/2/97
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2.11 ADMINISTRATIVE REVIEW PROCEDURES. (Cr. #51-76) (1) **PURPOSE.** To insure fair play and due process in the administration of the affairs, ordinances, resolutions and bylaws of the City, the Council hereby declares that the provisions of Ch. 68, Wis. Stats., relating to municipal administrative review procedure shall be in full force and effect in the City, except as provided in sub. (4) of this section.

(2) **WHO AFFECTED.** All officers, employees, agents, agencies, committees, boards and commissions of the City shall comply with the requirements of Ch. 68, Wis. Stats., and shall conduct initial administrative reviews of their own determinations in accordance with §68.09, Wis. Stats., upon the filing of a proper written request therefor.

(3) **APPEALS BOARD.** There is hereby created for the City an Administrative Review Appeals Board consisting of 3 members which shall hear appeals from initial administrative determinations or decisions of officers, employees, agents, agencies, committees, boards and commissions of the City filed in accordance with §68.10, Wis. Stats., and shall make a final determination thereon. In conducting administrative review hearings and making final decisions, the Board shall be governed by the provisions of §§68.11 and 68.12, Wis. Stats. The Administrative Review Appeals Board shall consist of the Mayor, one alderman, and one citizen. The alderman member shall be designated annually by the Mayor at the first meeting of the Council in June of each year and shall be subject to confirmation by the Council. The citizen member shall be appointed by the Mayor subject to confirmation of the Council for a 2-year term commencing on July 1 of the even-numbered years. The Mayor shall serve as the Chairman of the Board. The Mayor may appoint, subject to confirmation, for a 2-year term one alternate member who shall act with full power only when a member of the Board is absent or refuses to serve because of interest in the subject matter of the appeal. The Board may adopt rules for conduct of hearings not in conflict or inconsistent with the provisions of §68.11, Wis. Stats.

(4) **WHEN NOT APPLICABLE.** The provisions of this section shall not be deemed to repeal or supersede the provisions of any other ordinances or statutes in conflict herewith or providing other procedures for review of administrative determinations within the City except when otherwise specifically provided for in such ordinances or statutes.

the City of Waukesha, and to minimize the transmission of sexual diseases including AIDS;
and

WHEREAS, although the provisions of this ordinance have neither the purpose or effect of imposing a limitation or restriction on the content of any communicative materials, the Common Council deems it to be in the interests of the City of Waukesha to provide for licensing and regulation of adult oriented establishments including, but not limited to, adult bookstores, adult mini-motion picture establishments, adult motion picture theaters and adult cabarets to combat and curb the secondary effects of such establishments.

NOW, THEREFORE, the Common Council of the City of Waukesha do ordain as follows:

ADULT ORIENTED ESTABLISHMENTS. (1) DEFINITIONS: (Am. #28-95)

Adult Bookstore. An establishment which has a facility or facilities, including but not limited to booths, cubicles, rooms or stalls, for the presentation of "adult entertainment", as defined below, including adult oriented films, movies or live performances for observation by patrons therein; or an establishment having as a substantial or significant portion of its stock in trade, for sale, rent, trade, lease, inspection or viewing, books, films, video cassettes, magazines or other periodicals, which are distinguished or characterized by their emphasis on matters depicting, describing or relating to specified anatomical areas or specified sexual activities as defined below.

Adult Cabaret. A cabaret which features topless dancers, strippers, male or female impersonators or similar entertainers.

Adult Entertainment. Any exhibition of any motion picture, live performance, display or dance of any type, which has as its dominant theme or is distinguished or characterized by an emphasis on any actual or simulated specified sexual activities or specified anatomical areas as herein defined.

Adult Mini-Motion Picture Theater. An enclosed building with a capacity of less than 50 persons used for presenting material having as its dominant theme or distinguished or characterized by an emphasis on matters depicting, describing or relating to specified sexual activities or specified anatomical areas as herein defined for observation by patrons therein.

Adult Motion Picture Theater. An enclosed building with a capacity of 50 or more persons used for presenting material having as its dominant theme or distinguished or characterized by an emphasis on matters depicting, describing or relating to specified sexual activities or specified anatomical areas as defined below for observation by patrons therein.

Adult Oriented Establishment. Any premises including, but not limited to, "adult bookstores", "adult motion picture theaters", "adult mini-motion picture establishments" or

3. Fondling or erotic touching of human genitals, pubic region, buttocks or female breasts.

(2) LICENSE. (a) Except as provided in subsection (d) below, from and after the effective date of this section, no adult oriented establishment shall be operated or maintained in the City without first obtaining a license to operate issued by the City.

(b) A license may be issued only for one adult oriented establishment located at a fixed and certain place. Any person who desires to operate more than one adult oriented establishment must have a license for each.

(c) No license or interest in a license may be transferred to any person.

(d) All adult oriented establishments existing at the time of the passage of this section must submit an application for a license within 60 days of the passage of this section.

(3) APPLICATION FOR LICENSE. (a) Any person desiring to secure a license shall make application to the City Clerk. The application shall be filed in triplicate and dated by the City Clerk. A copy of the application shall be distributed promptly by the City Clerk to the City Police Department and to the applicant.

(b) The application for a license shall be upon a form provided by the City Clerk. An applicant for a license shall furnish the following information under oath:

1. Name and address.

2. Written proof that the individual is at least 18 years of age.

3. The address of the adult oriented establishment to be operated by the applicant.

4. If the applicant is a corporation, the application shall specify the name of the corporation, the date and state of incorporation, the name and address of the registered agents and the name and address of all shareholders owning more than 5% of the stock in such corporation and all officers and directors of the corporation.

(c) Within 21 days of receiving an application for a license, the City Clerk shall notify the applicant whether the application is granted or denied.

(d) Whenever an application is denied, the City Clerk shall advise the applicant in writing of the reasons for such action. If the applicant requests a hearing within 10 days of receipt of notification of denial, a public hearing shall be held within 10 days thereafter before the Council or its designated committee as hereinafter provided.

(e) Failure or refusal of the applicant to give any information relevant to the application or his refusal or failure to appear at any reasonable time and place for

renewal shall be upon a form provided by the City Clerk and shall contain such information and data given under oath or affirmation as is required for an application for a new license.

(b) A license renewal fee of \$250 shall be submitted with the application for renewal. In addition to the renewal fee, a late penalty of \$100 shall be assessed against any applicant who files for a renewal less than 60 days before the license expires. If the application is denied, 1/2 of the total fees collected shall be returned.

(c) If the City Police Department is aware of any information bearing on the operator's qualifications, that information shall be filed in writing with the City Clerk.

(d) (Cr. #22-91) The building inspector shall inspect the establishment prior to the renewal of a license to determine compliance with the provisions of this ordinance.

(8) REVOCATION OF LICENSE. (a) The Council shall revoke a license or permit for any of the following reasons:

1. Discovery that false or misleading information or data was given on any application or material facts were omitted from any application.

2. The operator or any employee of the operator violates any provision of this section or any rules or regulation adopted by the Council pursuant to this section provided, however, that in the case of a first offense by an operator where the conduct was solely that of an employee, the penalty shall not exceed a suspension of 30 days if the Council shall find that the operator had no actual or constructive knowledge of such violation and could not by the exercise of due diligence have had such actual or constructive knowledge.

3. The operator becomes ineligible to obtain a license or permit.

4. Any cost or fee required to be paid by this Section is not paid.

5. Any intoxicating liquor or cereal malt beverage is served or consumed on the premises of the adult oriented establishment.

(b) The Council, before revoking or suspending any license or permit, shall give the operator at least 10 days written notice of the charges against him and the opportunity for a public hearing before the Council or its designated committee as hereinafter provided.

(c) The transfer of a license or any interest in a license shall automatically and immediately revoke the license.

(d) Any operator whose license is revoked shall not be eligible to receive a license for one year from the date of revocation. No location or premises for which a license has

(b) Any act or omission of any employee constituting a violation of the provisions of this section shall be deemed the act or omission of the operator for purposes of determining whether the operator's license shall be revoked, suspended or renewed.

(c) No employee of an adult oriented establishment shall allow any minor to loiter around or to frequent an adult oriented establishment or to allow any minor to view adult entertainment as defined herein.

(d) The operator shall maintain the premises in a clean and sanitary manner at all times.

(e) The operator shall maintain at least 10 foot candles of light in the public portions of the establishment, including aisles, at all times. However, if a lesser level of illumination in the aisles shall be necessary to enable a patron to view the adult entertainment in a booth, room or cubicle adjoining an aisle, a lesser amount of illumination may be maintained in such aisles, provided, however, at no time shall there be less than one foot candle of illumination in said aisles, as measured from the floor.

(f) The operator shall insure compliance of the establishment and its patrons with the provisions of this section.

(11) ADMINISTRATIVE REVIEW PROCEDURE. The City ordinances and State law shall govern the administrative procedure and review regarding the granting, denial, renewal, nonrenewal, revocation or suspension of a license.

(12) PENALTIES AND PROSECUTION. Any person who shall violate any provisions of this Section or who shall fail to obtain a license or permit as required hereunder shall be subject to penalty as provided in §25.05 of this Municipal Code.

8.20 PAWNSHOP BUSINESS. (Cr. #7-76) (1) LICENSE REQUIRED. No person shall engage in the pawnshop business as defined herein, without first being licensed by the City and otherwise complying with this section. For purposes of this section, pawnshop business or pawnbroker means a person engaged in, conducting, managing or carrying on the business of loaning money on deposit or pledge of personal property or any other thing of value, or dealing in the purchasing of personal property or other thing of value on condition of selling same back again at a stipulated price.

(2) APPLICATION FOR LICENSE. No license shall be granted until the license fee has been paid to the City Treasurer, and an application has been filed with the City Clerk, nor until the completion of the investigation of such application as required in sub. (4) of this section.

(3) CONTENTS OF APPLICATION. Each application for a license shall contain the following information:

CHAPTER 68

MUNICIPAL ADMINISTRATIVE PROCEDURE

68.001 Legislative purpose.
 68.01 Review of administrative determinations.
 68.02 Determinations reviewable.
 68.03 Determinations not subject to review.
 68.04 Municipalities included.
 68.05 Municipal authority defined.
 68.06 Persons aggrieved.
 68.07 Reducing determination to writing.
 68.08 Request for review of determination.

68.09 Review of determination.
 68.10 Administrative appeal.
 68.11 Hearing on administrative appeal.
 68.12 Final determination.
 68.13 Judicial review.
 68.14 Legislative review.
 68.15 Availability of methods of resolving disputes.
 68.16 Election not to be governed by this chapter.

68.001 Legislative purpose. The purpose of this chapter is to afford a constitutionally sufficient, fair and orderly administrative procedure and review in connection with determinations by municipal authorities which involve constitutionally protected rights of specific persons which are entitled to due process protection under the 14th amendment to the U.S. constitution.

History: 1975 c. 295.

Investigatory and adjudicatory functions in administrative proceedings discussed. State ex rel. DeLuca v. Common Council, 72 W (2d) 672, 242 NW (2d) 689.

68.01 Review of administrative determinations. Any person having a substantial interest which is adversely affected by an administrative determination of a governing body, board, commission, committee, agency, officer or employee of a municipality or agent acting on behalf of a municipality as set forth in s. 68.02, may have such determination reviewed as provided in this chapter. The remedies under this chapter shall not be exclusive. No department, board, commission, agency, officer or employee of a municipality who is aggrieved may initiate review under this chapter of a determination of any other department, board, commission, agency, officer or employee of the same municipality, but may respond or intervene in a review proceeding under this chapter initiated by another.

History: 1975 c. 295.

68.02 Determinations reviewable. The following determinations are reviewable under this chapter:

(1) The grant or denial in whole or in part after application of an initial permit, license, right, privilege, or authority, except an alcohol beverage license.

(2) The suspension, revocation or nonrenewal of an existing permit, license, right, privilege, or authority, except as provided in s. 68.03 (5).

(3) The denial of a grant of money or other thing of substantial value under a statute or ordinance prescribing conditions of eligibility for such grant.

(4) The imposition of a penalty or sanction upon any person except a municipal employee or officer, other than by a court.

History: 1975 c. 295; 1981 c. 79.

68.03 Determinations not subject to review. Except as provided in s. 68.02, the following determinations are not reviewable under this chapter:

(1) A legislative enactment. A legislative enactment is an ordinance, resolution or adopted motion of the governing body of a municipality.

(2) Any action subject to administrative or judicial review procedures under other statutes.

(3) The denial of a tort or contract claim for money, required to be filed with the municipality pursuant to statutory procedures for the filing of such claims.

(4) The suspension, removal or disciplining or nonrenewal of a contract of a municipal employee or officer.

(5) The grant, denial, suspension or revocation of an alcohol beverage license under s. 125.12 (1).

(6) Judgments and orders of a court.

(7) Determinations made during municipal labor negotiations.

(8) Any action which is subject to administrative review procedures under an ordinance providing such procedures as defined in s. 68.16.

(9) Notwithstanding any other provision of this chapter, any action or determination of a municipal authority which does not involve the constitutionally protected right of a specific person or persons to due process in connection with the action or determination.

History: 1975 c. 295; 1981 c. 79.

68.04 Municipalities included. "Municipality", as used in this chapter, includes any county, city, village, town, technical college district, special purpose district or board or commission thereof, and any public or quasi-public corporation or board or commission created pursuant to statute, ordinance or resolution, but does not include the state, a state agency, a corporation chartered by the state or a school district as defined in s. 115.01 (3).

History: 1975 c. 295; 1993 a. 399.

68.05 Municipal authority defined. "Municipal authority" includes every municipality and governing body, board, commission, committee, agency, officer, employee, or agent thereof making a determination under s. 68.01, and every person, committee or agency of a municipality appointed to make an independent review under s. 68.09 (2).

History: 1975 c. 295.

68.06 Persons aggrieved. A person aggrieved includes any individual, partnership, limited liability company, corporation, association, public or private organization, officer, department, board, commission or agency of the municipality, whose rights, duties or privileges are adversely affected by a determination of a municipal authority.

History: 1975 c. 295; 1993 a. 112.

68.07 Reducing determination to writing. If a determination subject to this chapter is made orally or, if in writing, does not state the reasons therefor, the municipal authority making such determination shall, upon written request of any person aggrieved by such determination made within 10 days of notice of such determination, reduce the determination and the reasons therefor to writing and mail or deliver such determination and reasons to the person making the request. The determination shall be dated, and shall advise such person of the right to have such determination reviewed, the time within which such review may be obtained, and the office or person to whom a request for review shall be addressed.

History: 1975 c. 295, 421.

68.08 Request for review of determination. Any person aggrieved may have a written or oral determination reviewed by written request mailed or delivered to the municipal authority which made such determination within 30 days of notice to such person of such determination. The request for review shall state the ground or grounds upon which the person aggrieved contends that the decision should be modified or reversed. A request for review shall be made to the officer, employee, agent, agency, committee, board, commission or body who made the determination but failure to make such request to the proper party shall not preclude the person aggrieved from review unless such failure has caused prejudice to the municipal authority.

History: 1975 c. 295.

68.09 Review of determination. (1) INITIAL DETERMINATION. If a request for review is made under s. 68.08, the determination to be reviewed shall be termed an initial determination.

(2) WHO SHALL MAKE REVIEW. A review under this section may be made by the officer, employee, agent, agency, committee, board, commission or body who made the initial determination. However, an independent review of such initial determination by another person, committee or agency of the municipality may be provided by the municipality.

(3) WHEN TO MAKE REVIEW. The municipal authority shall review the initial determination within 15 days of receipt of a request for review. The time for review may be extended by agreement with the person aggrieved.

(4) RIGHT TO PRESENT EVIDENCE AND ARGUMENT. The person aggrieved may file with the request for review or within the time agreed with the municipal authority written evidence and argument in support of the person's position with respect to the initial determination.

(5) DECISION ON REVIEW. The municipal authority may affirm, reverse or modify the initial determination and shall mail or deliver to the person aggrieved a copy of the municipal authority's decision on review, which shall state the reasons for such decision. The decision shall advise the person aggrieved of the right to appeal the decision, the time within which appeal shall be taken and the office or person with whom notice of appeal shall be filed.

History: 1975 c. 295, 421.

68.10 Administrative appeal. (1) FROM INITIAL DETERMINATION OR DECISION ON REVIEW. (a) If the person aggrieved did not have a hearing substantially in compliance with s. 68.11 when the initial determination was made, the person may appeal under this section from the decision on review and shall follow the procedures set forth in ss. 68.08 and 68.09.

(b) If the person aggrieved had a hearing substantially in compliance with s. 68.11 when the initial determination was made, the person may elect to follow the procedures provided in ss. 68.08 and 68.09, but is not entitled to appeal under this section unless granted by the municipal authority. The person may, however, seek review under s. 68.13.

(2) TIME WITHIN WHICH APPEAL MAY BE TAKEN UNDER THIS SECTION. Appeal from a decision on review under s. 68.09 shall be taken within 30 days of notice of such decision.

(3) HOW APPEAL MAY BE TAKEN. An appeal under this section may be taken by filing with or mailing to the office or person designated in the municipal authority's decision on review, written notice of appeal.

History: 1975 c. 295, 421.

68.11 Hearing on administrative appeal. (1) TIME OF HEARING. The municipality shall provide the appellant a hearing on an appeal under s. 68.10 within 15 days of receipt of the notice of appeal filed or mailed under s. 68.10 and shall serve the appellant with notice of such hearing by mail or personal service at least 10 days before such hearing.

(2) CONDUCT OF HEARING. At the hearing, the appellant and the municipal authority may be represented by an attorney and

may present evidence and call and examine witnesses and cross-examine witnesses of the other party. Such witnesses shall be sworn by the person conducting the hearing. The municipality shall provide an impartial decision maker, who may be an officer, committee, board, commission or the governing body who did not participate in making or reviewing the initial determination, who shall make the decision on administrative appeal. The decision maker may issue subpoenas. An appellant's attorney of record may issue a subpoena to compel the attendance of a witness or the production of evidence. A subpoena issued by an attorney must be in substantially the same form as provided in s. 805.07 (4) and must be served in the manner provided in s. 805.07 (5). The attorney shall, at the time of issuance, send a copy of the subpoena to the decision maker. The hearing may, however, be conducted by an impartial person, committee, board or commission designated to conduct the hearing and report to the decision maker.

(3) RECORD OF HEARING. The person conducting the hearing or a person employed for that purpose shall take notes of the testimony and shall mark and preserve all exhibits. The person conducting the hearing may, and upon request of the appellant shall, cause the proceedings to be taken by a stenographer or by a recording device, the expense thereof to be paid by the municipality.

History: 1975 c. 295; 1989 a. 139.

68.12 Final determination. (1) Within 20 days of completion of the hearing conducted under s. 68.11 and the filing of briefs, if any, the decision maker shall mail or deliver to the appellant its written determination stating the reasons therefor. Such determination shall be a final determination.

(2) A determination following a hearing substantially meeting the requirements of s. 68.11 or a decision on review under s. 68.09 following such hearing shall also be a final determination.

History: 1975 c. 295.

68.13 Judicial review. (1) Any party to a proceeding resulting in a final determination may seek review thereof by certiorari within 30 days of receipt of the final determination. The court may affirm or reverse the final determination, or remand to the decision maker for further proceedings consistent with the court's decision.

(2) If review is sought of a final determination, the record of the proceedings shall be transcribed at the expense of the person seeking review. A transcript shall be supplied to anyone requesting the same at the requester's expense. If the person seeking review establishes impecuniousness to the satisfaction of the reviewing court, the court may order the proceedings transcribed at the expense of the municipality and the person seeking review shall be furnished a free copy of the transcript. By stipulation, the court may order a synopsis of the proceedings in lieu of a transcript. The court may otherwise limit the requirement for a transcript.

History: 1975 c. 295, 421; 1981 c. 289.

Judicial Council Note, 1981: Reference in sub. (1) to a "writ" of certiorari has been removed because that remedy is now available in an ordinary action. See s. 781.01, stats., and the note thereto. [Bill 613-A]

68.14 Legislative review. (1) The seeking of a review pursuant to s. 68.10 or 68.13 does not preclude a person aggrieved from seeking relief from the governing body of the municipality or any of its boards, commissions, committees, or agencies which may have jurisdiction.

(2) If in the course of legislative review under this section, a determination is modified, such modification and any evidence adduced before the governing body, board, commission, committee or agency shall be made part of the record on review under s. 68.13.

(3) The governing body, board, commission, committee or agency conducting a legislative review under this section need not conduct the type of hearing required under s. 68.11.

History: 1975 c. 295.

68.15 Availability of methods of resolving disputes. This chapter does not preclude any municipality and person

RESOLUTION

WHEREAS, City News and Novelty, Inc. is licensed to operate an adult oriented establishment pursuant to the provisions of section 8.195 of the Waukesha Municipal Code at 245 W. Main Street, Waukesha, Wisconsin, for the license year commencing January 26, 1995 and expiring on January 25, 1996; and

WHEREAS, on 12/24/94 City News and Novelty, Inc. through its employees and/or agents permitted minors to loiter contrary to the provisions of section 8.195(10) of the Waukesha Municipal Code; and

WHEREAS, on 11/30/94, 12/1/94 and 12/2/94 City News and Novelty, Inc. through its employees and/or agents violated the provisions of section 8.195(9)(b)2 of the Waukesha Municipal Code by failing to have every booth, room or cubicle totally open to a public lighted aisle so that permitting an unobstructed view at all times of anyone occupying the same; and

WHEREAS, each of the violations set forth above resulted in five (5) convictions in Municipal Court in the City of Waukesha during the 1995 license year; and

WHEREAS, on July 23, 1995, October 18, 1995, and November 29, 1995, minors were permitted to loiter on the subject premises contrary to section 8.195(10) of the Waukesha Municipal Code; and

WHEREAS, on 9/12/94 a patron of City News and Novelty, Inc. was arrested for exposing himself to an employee. The patron was convicted of the criminal charge of lewd and lascivious conduct on April 12, 1995 contrary to section 944.20 of the Wisconsin Statutes; and

WHEREAS, on 2/28/95 a patron of City News and Novelty, Inc. engaged in sexual conduct inside a viewing booth and was observed by a police officer. The patron was convicted of lewd and lascivious conduct on 11/2/95 contrary to section 944.20 of the Wisconsin Statutes. This activity is also contrary to the provision of section 8.195(9)(c) of the Waukesha Municipal Code; and

WHEREAS, on 3/12/95 a patron of City News and Novelty, Inc. engaged in sexual conduct inside a viewing booth and was observed by a police officer. The patron was convicted of lewd and lascivious conduct on 12/1/95 contrary to section 944.20 of the Wisconsin Statutes. This activity is also contrary to the provision of section 8.195(9)(c) of the Waukesha Municipal Code.

NOW, THEREFORE, BE IT RESOLVED that based upon the aforementioned convictions and violations, and sexual activity occurring in the viewing booths on the premises which occurred during the license year 1995, the Common Council of the City of Waukesha and hereby denies the renewal of an Adult Oriented Establishment License for City News and Novelty, Inc. for the license year 1996 commencing January 26, 1996.

BE IT FURTHER RESOLVED, that City News and Novelty has the right to have this determination reviewed within 30 days of receipt of this notice by requesting a review by the Common Council. The request for review shall be submitted to the City Clerk and shall state the grounds upon which City News and Novelty, Inc. contends that the determination should be modified or reversed.

BE IT FURTHER RESOLVED, that the procedures and provisions of sec. 68.08 through 68.12 of the Wisconsin Statutes and sec. 2.11 of the Waukesha Municipal Code shall apply in the review process of this determination.

Approved this 19th day of December, 1995.

Carol A. Opel
Carol A. Opel, Mayor

Attest:

Thomas Neill
Tom Neill
Clerk/Treasurer

**CITY OF WAUKESHA
ADMINISTRATIVE REVIEW APPEALS BOARD**

**RE: IN THE MATTER OF THE NONRENEWAL OF ADULT ORIENTED
ESTABLISHMENT LICENSE OF CITY NEWS AND NOVELTY, INC.**

FINDINGS, CONCLUSIONS AND DECISION

1. On November 15, 1995, City News and Novelty, Inc. applied to renew its adult oriented establishment license under the provisions of Section 8.195 of the Municipal Code of Waukesha for the license year commencing January 26, 1996. City News and Novelty, Inc., is the corporate licensee and operator of the adult oriented establishment located at 245 W. Main Street in the City of Waukesha. City News and Novelty, Inc. is subject to the provisions of Section 8.195 of the Municipal Code of Waukesha.
2. On December 19, 1995, the Common Council of the City of Waukesha passed Resolution R88-95 in which it determined not to renew the adult oriented establishment license of City News and Novelty, Inc. issued under the provisions of Section 8.195 of the Municipal Code of Waukesha.

3. Pursuant to Section 68.08, Wis. Stats., a request was made by City News and Novelty, Inc. to and for the Common Council to review its December 19, 1995 Initial Determination.
4. On January 22, 1996, the Common Council rendered by motion duly made, seconded and unanimously adopted a Decision on Review issued by letter dated January 23, 1996, in which it affirmed its December 19, 1995 Initial Determination.
5. Pursuant to Section 68.10, Wis. Stats., City News and Novelty, Inc. appealed the Decision on Review issued by the Common Council to the City of Waukesha Administrative Review Appeals Board (hereinafter "the Board").
6. City News and Novelty, Inc. waived the time periods for this administrative review pursuant to Section 68.11, Wis. Stats., and the time period for the Board to make a final determination pursuant to Section 68.12, Wis. Stats.
7. Pursuant to Section 68.12, Wis. Stats. and Section 2.11 of the Municipal Code of Waukesha, an administrative hearing was held before the Board on April 2 and 9, and May 7 and 8, 1996 and the Board deliberated the case on June 10, 18, 25 and 28, 1996. The Common Council was represented by City Attorney Curt Meitz, City News and Novelty, Inc., the operator and licensee, was represented by attorneys Jeff Scott Olson and Percy Julian and the Board, comprised of Mayor Carol A. Opel, Ralph M. North III, and

Alderman Jerome A. Seidl, was represented by Attorney John P. Macy.

The hearing was transcribed by a court reporter, witnesses were sworn, exhibits marked and preserved, and attorneys were allowed to cross examine witnesses called by the opposing side.

8. Prior to the testimony being heard, City News and Novelty, Inc. challenged the impartiality of Mayor Opel and Ald. Seidl and requested that they disqualify themselves from hearing this appeal. Both Mayor Opel and Ald. Seidl find that they did not vote upon any decision or participate in any discussion made by the Common Council in rendering its Initial Decision and Determination on Review. Further, they both find that they are not prejudiced in this matter and are impartial decision makers. Therefore, the Board rejects the challenge of City News and Novelty, Inc. in this regard.
9. Prior to the testimony being heard, the parties stipulated to the following:
 - A. Request for Review of Initial Determination was timely filed.
 - B. Request to appeal the Decision of Review was timely filed.
 - C. Hearing has been timely scheduled.
 - D. All notice requirements have been satisfied.

E. The court reporter would swear in the witnesses.

10. Prior to the testimony being heard, City News and Novelty, Inc. questioned the order of the hearing. The Board ruled that the Applicant would go first.
11. Prior to the testimony being heard, City News and Novelty, Inc. asked that the Board make a determination that the Common Council has the burden of proof in this matter. The Board took the issue under advisement.
12. Pursuant to Section 8.195 Municipal Code of Waukesha the purpose and rationale of licensing adult oriented establishments are as set forth in the preamble of Section 8.195 of the Municipal Code of Waukesha and are to combat and curb the adverse secondary effects brought on by adult oriented establishments; to protect the health, safety and welfare of the citizens of Waukesha from increased crime including sex related crimes; to preserve and stabilize its neighborhoods and to minimize the transmission of sexual diseases; but not to have the purpose or effect of imposing a limitation or restriction on the content of any communicative materials. Secondary effects of adult oriented establishments include contributing to physical deterioration and blight of a neighborhood, a deleterious effect on both existing businesses around adult oriented establishments and surrounding residential areas, including increased transience and increased levels of criminal activities, including sex related crimes. In addition, studies from other communities

relied upon by the Common Council found that viewing booths in adult oriented establishments have been and are being used by patrons of said establishments for engaging in sexual acts resulting in unsafe and unsanitary conditions in said booths.

13. Pursuant to Section 8.195 of the Municipal Code of Waukesha, the standards for issuance of license (i.e., to receive a new or renewal license to operate) are as set forth in Subsection 8.195 (4).
14. In that City News and Novelty, Inc. is a corporation, the standards for renewal are as set forth in Subsection 8.195 (4)(b) of the Municipal Code of Waukesha.
15. There is no evidence that there is a violation of Subsection 8.195 (4)(b)1 of the Municipal Code of Waukesha which requires that all officers, directors and stockholders required to be named under Subsection 8.195(3)(b) of the Municipal Code of the Waukesha shall be at least 18 years of age.
16. There is evidence that there are violations of Subsection 8.195 (4)(b)2 of the Municipal Code of Waukesha which requires that officers, directors or stockholders required to be named under Subsection 8.195 (3)(b) of the Municipal Code of Waukesha have violated Subsections of Section 8.195 of

the Municipal Code of Waukesha within 5 years immediately preceding the date of the application.

A. Subsection 8.195 (10)(c) of the Municipal Code of Waukesha has been violated since it provides that no employee of an adult oriented establishment shall allow any minor to loiter around or frequent in an adult oriented establishment or allow a minor to view adult entertainment as defined herein. A violation of this Subsection is a basis for nonrenewal of a license issued under Section 8.195 because Subsection 8.195 (10)(b) provides that any act or omission of an employee constituting a violation of the provisions of Section 8.195 shall be deemed the act or omission of the operator for purposes of determining whether the operator's license shall be revoked, suspended or renewed and because operator is defined in Section 8.195 of the Municipal Code of Waukesha as any person, partnership, or corporation operating, conducting, maintaining or owning any adult oriented establishment. The Board finds the following specific violations:

1. On December 24, 1994, Officer Richard Piagentini observed a patron at City News and Novelty, Inc. at 245 W. Main Street in the City of Waukesha, who was a minor. Officer Piagentini made the observation while on patrol. Peggy Lindsley, the employee on duty at the time, and Daniel Bishop, a director of City News and

Novelty, Inc., were both convicted of civil ordinance violations contrary to Section 8.195, Subsection 8.195(10)(c) of the Municipal Code of Waukesha on August 23, 1995. There was no evidence to refute the credible testimony of Officer Piagentini.

2. On July 23, 1995, Officer John Konkol observed S.S., a patron, at City News and Novelty, Inc. at 245 W. Main Street in the City of Waukesha, who was a minor. Officer Konkol made the observation while on duty. Additionally, S.S. testified that she was a patron at City News and Novelty, Inc. at 245 W. Main Street in the City on July 23, 1995 and on said date she was a minor. Christopher Alverson, the employee on duty at the time, was convicted of a civil ordinance violation contrary to Section 8.195, Subsection 8.195(10)(c) of the Municipal Code of Waukesha on August 25, 1995. There was no evidence to refute the credible testimony of Officer Konkol or S.S.
3. On October 18, 1995, Officer Mark Howard, observed S.D., a patron, at City News and Novelty, Inc. at 245 W. Main Street in the City of Waukesha, who was a minor. Officer Howard made the observation during the course of a routine investigation. Additionally, S.D. testified that he was a patron of City News and Novelty, Inc. at 245 W. Main Street in the City of Waukesha on

October 18, 1995 and on said date he was a minor. There was no evidence to refute the credible testimony of Officer Howard and S.D.

4. On November 29, 1995, Officer Paul Paikowski observed a patron of City News and Novelty, Inc. at 245 W. Main Street in the City of Waukesha, who was a minor. Officer Paikowski made these observations as a result of a routine inspection of the premises. He was not called to the scene by an employee of City News and Novelty, Inc. There was no evidence to refute the credible testimony of Officer Paikowski.

- B. Subsection 8.195(9) of the Municipal Code of Waukesha has been violated since Subsection 8.195(9)(b)2 requires that every booth, room or cubicle shall have at least one side totally open to a public lighted aisle so that there is an unobstructed view at all times of anyone occupying the same. A violation of this Subsection is a basis for nonrenewal of a license issued under Section 8.195 because Subsection 8.195 (10)(f) states that the operator shall insure compliance of the establishment and its patrons with the provisions of Section 8.195 of the Municipal Code of Waukesha and operator is defined as any person, partnership, or corporation operating, conducting, maintaining or owning any adult oriented establishment. The Board finds the following specific violation:

1. On November 7, 1994, Building Inspector Marv Lemke observed at 245 W. Main Street in the City of Waukesha that wood panels had been installed perpendicular to the front of the interior partition of viewing booths between 9 and 11 inches in width having the effect of narrowing the booth openings by approximately $\frac{1}{3}$ since his previous inspection the year before. The wood panels narrowed the opening of the booths and obstructed the view of someone looking into the booth contrary to the requirement that at least one side be totally open to a public lighted aisle so that there is an unobstructed view at all times of anyone occupying the same. The wood panels were not necessary for the structural stability of the booth. Daniel L. Bishop, a director of City News and Novelty, Inc. was convicted of three (3) civil ordinance violations contrary to Section 8.195, Subsection 8.195(9)(b)(2) of the Municipal Code of Waukesha on August 23, 1995. There was no evidence to refute the credible testimony of Building Inspector Lemke.

C. Subsection 8.195(9) of the Municipal Code of Waukesha has been violated since Subsection 8.195(9)(c) requires that no occupants of a booth, room or cubicle shall engage in any type of sexual activity. A violation of this Subsection is a basis for nonrenewal of a license issued under Section 8.195 because Subsection 8.195 (10)(f) states that the

operator shall insure compliance of the establishment and its patrons with the provisions of Section 8.195 of the Municipal Code of Waukesha and operator is defined as any person, partnership, or corporation operating, conducting, maintaining or owning any adult oriented establishment. The Board finds the following specific violations:

1. On February 28, 1995, Officer John Gibbs observed a patron of City News and Novelty, Inc. at 245 W. Main Street in the City of Waukesha, masturbating in a viewing booth. Officer Gibbs made these observations as a result of a routine inspection of the premises. He was not called to the scene by an employee of City News and Novelty, Inc. There were no employees in the booth area when the Officer made his observation. The patron was convicted of the criminal charge of lewd and lascivious conduct contrary to Section 944.20, Wis. Stats. There was no testimony presented to refute the credible testimony of Officer Gibbs.
2. On March 11, 1995, Officer Paul De Jarlais observed a patron at City News and Novelty, Inc. at 245 W. Main St. in the City of Waukesha, masturbating in a viewing booth. Officer De Jarlais made these observations as a result of a routine inspection of the premises. He was not called to the scene by an employee of City News and Novelty, Inc. There were no employees in the booth area

when the Officer made his observation. The patron was convicted of the criminal charge of lewd and lascivious conduct contrary to Section 944.20, Wis. Stats. There was no testimony presented to refute the credible testimony of Officer De Jarlais.

17. In consideration of the issue of which party bears the burden of proof, the Board concludes that City News and Novelty, Inc., as applicant, had an initial burden of showing, as a minimum, that all jurisdictional requirements to effectuate an appeal to the Board pursuant to Chapter 68, Wisconsin Statutes, were satisfied.

18. In consideration of the issue of which party bears the ultimate burden of proof, the Board has considered special policy considerations, judicial estimate of probabilities, convenience, fairness factors and the natural tendency to place the burden on the party desiring change. The Common Council has permitted City News and Novelty, Inc. to continue its business operation pending the determination of the Board after a due process hearing.

Therefore, the City desires a change in the status quo. Moreover, special policy considerations argue strongly in favor of requiring the City to set out facts in support of the Common Council's decision not to renew. The City has the convenience of facts at its command and is able to provide the Board with information in support of its belief that nonrenewal is appropriate.

Finally, the notion of requiring a party to prove lack of violations is of

questionable fairness. Therefore, the Board concludes that the City bears the ultimate burden of proof.

19. The Board further concludes that, irrespective of the order of proof during the hearing, all due process requirements have been satisfied in that both parties were afforded full opportunity to present any and all evidence in support of their respective positions; neither party was prejudiced in any manner by the order of proof; and the hearing afforded both parties a constitutionally sufficient, fair and orderly administrative procedure to review the determination of the Common Council.

20. Based on the foregoing findings and conclusions and all of the documentation and testimonial evidence, the Board decides that there is substantial evidence in the record and a reasonable basis to conclude that the decision of the Common Council be upheld and that the adult-oriented establishment license of City News and Novelty, Inc. not be renewed for the license year 1996. The Board, therefore, affirms that decision.

These Findings, Conclusions and Decision of the City of Waukesha
Administrative Review Appeals Board are unanimously adopted this 28th day of
June, 1996.

Carol A. Opel

Carol A. Opel, Mayor

Jerome A. Seidl

Jerome A. Seidl, Alderman

Ralph M. North III

Ralph M. North III, Citizen

ADMREV